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No. 09-77

In the Supreme Court of the United States

SANDRA LETICIA MARTINEZ-RODRIGUEZ,
PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals that lacks jurisdiction to consider a petition for judicial review challenging the merits of a final order of removal nonetheless has jurisdiction to review the Board of Immigration Appeals' intermediate procedural decision to resolve an administrative appeal by way of a single-member decision rather than a decision by a three-member panel.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not published in the *Federal Reporter* but is reprinted in 313 Fed. Appx. 154. The decisions of the Board of Immigration Appeals (Pet. App. 16a-19a) and the immigration judge (Pet. App. 20a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2009. On May 20, 2009, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including July 20, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), provides that the Attorney General "may cancel [the] removal of, and adjust to the status of an alien lawfully admitted for permanent residence," certain aliens who are "inadmissible or deportable from the United States." 8 U.S.C. 1229b(b)(1). To be statutorily eligible for cancellation of removal, such an alien must meet certain criteria, which include "establish[ing] that removal would result in exceptional and extremely unusual hardship to the alien's [United States citizen or lawful permanent resident] spouse, parent, or child." 8 U.S.C. 1229b(b)(1)(D).

b. An alien who has been ordered removed from the United States by an immigration judge (IJ) may appeal the IJ's order to the Board of Immigration Appeals (BIA or Board). See 8 C.F.R. 1003.1(b)(1)-(3), 1240.53(a). Before 1999, administrative appeals from the removal orders of IJs were heard by three-member panels of the Board. On October 18, 1999, however, the Attorney General adopted new regulations, which were further amended on August 26, 2002, to streamline the appellate process. See 64 Fed. Reg. 56,135 (1999); 67 Fed. Reg. 54,878 (2002).

Under the streamlining regulations, all appeals to the Board are assigned to a single Board member for disposition "unless a case meets the standards for assignment to a three-member panel under" 8 C.F.R. 1003.1(e)(6). See 8 C.F.R. 1003.1(e).[1] Whether the

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[1] Section 1003.1(e)(6) provides:

> Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:

standards set forth in Section 1003.1(e)(6) have been met is decided once the transcript is prepared and the appeal has been briefed. *Ibid.* If the Board member determines that the appeal does not warrant consideration by a three-member panel, the Board member next determines whether the appeal should affirmed without opinion under 8 C.F.R. 1003.1(e)(4) or resolved via a brief single-member decision under 8 C.F.R. 1003.1(e)(5).[2]

The impetus for the streamlining reform was an explosive increase in the Board's caseload. See 64 Fed. Reg. at 56,136. Between 1984 and 1998, the number of

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> (i) The need to settle inconsistencies among the rulings of different immigration judges;
>
> (ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;
>
> (iii) The need to review a decision by an immigration judge or the [Department of Homeland Security (DHS)] that is not in conformity with the law or with applicable precedents;
>
> (iv) The need to resolve a case or controversy of major national import;
>
> (v) The need to review a clearly erroneous factual determination by an immigration judge; or
>
> (vi) The need to reverse the decision of an immigration judge or [DHS], other than a reversal under [8 C.F.R.] § 1003.1(e)(5).

8 C.F.R. § 1003.1(e)(6).

[2] Section 1003.1(e)(4) provides for affirmance without opinion if the case is "squarely controlled by existing Board or federal court precedent and do[es] not involve the application of precedent to a novel factual situation," or that "[t]he factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion." 8 C.F.R. 1003.1(e)(4)(A) and (B).

new appeals and motions before the Board increased from 3000 annually to 28,000 annually. *Ibid.* Faced with such a staggering increase, the Board's ability to accomplish its mission—"to provide fair and timely immigration adjudications and authoritative guidance and uniformity in the interpretation of the immigration laws"—had been compromised. *Ibid.* To ameliorate that problem, the Attorney General implemented the system of streamlined appellate review. The system is premised on the recognition that "in a significant number of appeals and motions filed with the Board, a single appellate adjudicator can reliably determine that the result reached by the adjudicator below is correct and should not be changed on appeal." 64 Fed. Reg. at 56,135. The result is a system that enables the Board to render decisions in a more timely manner, while husbanding its limited resources. See *Blanco de Belbruno* v. *Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004) ("[T]he agency adopted regulations that would allow it to focus a greater measure of its resources on more complicated cases.").

Statistics furnished by the Executive Office for Immigration Review (EOIR) show that the single-member review process is now, as intended, "the dominant method of adjudication" before the BIA. 67 Fed. Reg. 54,879 (2002). EOIR advises that the BIA resolved a total of 143,101 appeals during the first two fiscal years following the 2002 amendments to the streamlining regulations. Of those cases, 6.5% were resolved by a three-member panel, 64.4% were resolved in a brief opinion by a single Board member, and 29.9% were affirmed without opinion using the mechanism provided in 8 C.F.R. 1003.1(e)(4).

c. The INA generally authorizes "judicial review of a final order of removal." 8 U.S.C. 1252(a). Section 1252(a)(2)(B), however, provides that "no court shall have jurisdiction to review" the BIA's denial of certain forms of discretionary relief, 8 U.S.C. 1252(a)(2)(B), including the denial of an alien's request for cancellation of removal under Section 1229b, see 8 U.S.C. 1252(a)(2)(B)(i).

2. a. Petitioner is a citizen of Mexico who entered the United States illegally in 1988. Pet. App. 16a, 21a. In 2004, the Department of Homeland Security commenced removal proceedings, charging that petitioner was subject to removal because she was "present in the United States without being admitted or paroled." 8 U.S.C. 1182(a)(6)(A)(i); see Pet. App. 21a-22a. Petitioner conceded that she was removable as charged, but sought cancellation of removal. *Id.* at 22a.

The IJ held an evidentiary hearing, at which it heard testimony from petitioner, petitioner's father, the father of petitioner's three children, and petitioner's oldest child. Pet. App. 23a-29a. The IJ then issued a lengthy written opinion in which he concluded that petitioner was "not eligible for cancellation of removal," *id.* at 42a, because the hardship that petitioner's qualifying relatives would suffer as a result of her removal was not "substantially beyond that which ordinarily would be expected to result from [her] deportation." *Id.* at 41a (quoting *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 56 (B.I.A. 2001)).

b. Petitioner appealed the IJ's decision to the BIA, arguing that the IJ erred in concluding that she was ineligible for cancellation of removal. Administrative Record 76 (A.R.). Petitioner also "request[ed] that this matter be minimally reviewed by a three member

panel." A.R. 25. In support of that request, petitioner asserted that the IJ "made clearly erroneous factual determinations," argued that the IJ's decision was "not in conformity with applicable Board precedents," and suggested "that this case might * * * serve as a useful Board precedent with regard to * * * the issue of what constitutes 'exceptional and extremely unusual hardship'" because it had been "more than five years since the Board has readdressed th[e] issue in a precedent decision." A.R. 25-26; see note 1, *supra*.

c. The BIA dismissed petitioner's appeal in a single-member decision issued under 8 C.F.R. 1003.1(e)(5). See Pet. App. 16a-19a. The Board "agree[d] with the [IJ] that [petitioner did] not qualify for cancellation of removal because she failed to show that her removal would result in exceptional and extremely unusual hardship for her qualifying relatives, namely her three United States citizen children and her lawful permanent resident father." *Id.* at 17a. The BIA stated that it had "considered [petitioner's] argument" that the IJ erred in failing to consider the hardship that petitioner's removal would cause to her common-law husband "because he has been attempting over a long period to obtain lawful permanent resident status in the United States." *Ibid.* The Board concluded, however, that it could not "consider him a qualifying relative for cancellation of removal purposes until he is accorded such status." *Ibid.* The BIA also noted that petitioner and her common-law husband "gave conflicting answers on whether [petitioner's] husband and United States citizen children would join her in Mexico if she is forced to return." *Ibid.* The Board stated that it "d[id] not consider the outcome of this inconsistency dispositive," however, because it could not "find that [petitioner] satisfied the

exceptional and extremely unusual hardship standard * * * regardless of whether her qualifying relatives chose to return with her to Mexico." *Id.* at 17a-18a.

3. a. Petitioner filed a petition for judicial review of the BIA's decision. Among other claims, petitioner argued that "the BIA * * * failed to follow the applicable regulation because the [Board] member assigned to her case did not forward her appeal to a three-[judge] panel for review." Pet. App. 4a.

b. In an unpublished opinion, the court of appeals held that, under the circumstances of this case, it lacked jurisdiction to review the BIA member's "procedural decision" to resolve petitioner's appeal via a single-member decision rather than referring it to a three-member panel. Pet. App. 15a; see *id.* at 10a-15a.[3] The court of appeals noted that its previous decision in *Tsegay* v. *Ashcroft*, 386 F.3d 1347 (10th Cir. 2004), held that the court lacked jurisdiction to review a single BIA member's procedural decision to affirm an IJ's decision without opinion in a situation where the court of appeals "did not have jurisdiction to review the IJ's underlying decision," Pet. App. 11a, and it concluded that the same result was warranted here.

The INA limits judicial review to "final order[s]" of removal. 8 U.S.C. 1252(b)(9). In *Tsegay*, the court of appeals concluded that "'the BIA's procedural decision to affirm without opinion' was not a final order of removal; it was simply the procedural agency action that made the IJ's decision the final order of removal, and the IJ's decision was not reviewable." Pet. App. 11a (quoting *Tsegay*, 386 F.3d at 1353). The court of appeals acknowledged that, in this case, "the BIA judge issued

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[3] The court of appeals also rejected various other arguments that petitioner does not renew before this Court. See Pet. App. 4a-10a.

a short opinion under [8 C.F.R.] 1003.1(e)(5) instead of affirming without opinion, and that short opinion became the final order of removal." Pet. App. 11a-12a. The court explained, however, that "the actual decision that [petitioner] is appealing from is the intermediate decision not to forward the case to a three-judge panel, not the BIA member's final order, which in no way addressed [the] decision not to forward the matter to a three-judge panel." *Id.* at 12a. The court of appeals also stated that in this case, as in *Tsegay*, "the final order of removal," which simply affirmed the IJ's denial of petitioner's request for cancellation of removal, "is not reviewable." *Ibid.*

The court of appeals also concluded that it did not have jurisdiction to review the BIA's streamlining decision under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See Pet. App. 12a-13a. Similar to the INA, the APA requires a "final agency action." 5 U.S.C. 704; see Pet. App. 12a. The court of appeals stated that, in this case, "[t]he final agency action was the BIA member's short opinion affirming the IJ's decision, not his preceding procedural decision." *Id.* at 13a. The court of appeals noted (*ibid.*) that the APA also provides that "[a] preliminary, procedural, or intermediate agency action not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. 704. But the court stated that, under the circumstances of this case, it "ha[d] no jurisdiction over the final agency action," and it concluded that it thus "ha[d] no jurisdiction * * * to * * * review the decision not to assign the appeal to a three-judge panel." Pet. App. 13a.

The court of appeals emphasized that was not holding "that we never have jurisdiction to review a BIA member's decision not to forward a case to a three-judge

panel." Pet. App. 13a. To the contrary, the court stated that its previous decision in *Batalova* v. *Ashcroft*, 355 F.3d 1246 (10th Cir. 2004), held that the court "did have jurisdiction to review" a BIA member's decision not to designate an appeal for a decision by a three-member panel in a case in which the court had jurisdiction to consider a challenge to the final order of removal itself. *Ibid.*; see *ibid.* (noting that *Tsegay* had distinguished *Batalova* on this ground).

ARGUMENT

Petitioner contends (Pet. 15-38) that the court of appeals erred in holding that it lacked jurisdiction to review her claim that the BIA violated its own regulations by not referring her appeal to a three-member panel under 8 C.F.R. 1003.1(e)(6). The court of appeals' unpublished decision is correct and does not conflict with a decision of any other court of appeals. Further review is not warranted.

1. The court of appeals' unpublished decision is correct. The INA authorizes judicial review of a BIA decision "only" by way of petition for review of "a final order." 8 U.S.C. 1252(b)(9); see 8 U.S.C. 1252(a)(1). As the court of appeals correctly determined (Pet. App. 12a), the Board member's "intermediate procedural decision not to forward the case to a three-judge panel" was not a final order. Instead, the final order in this case was the single-member BIA decision that affirmed the IJ's denial of petitioner's request for cancellation of removal. *Ibid.* That final order, however, "is not reviewable," *ibid.*, because the INA specifically provides that "no court shall have jurisdiction to review * * *

any judgment regarding" an alien's application for cancellation of removal. 8 U.S.C. 1252(a)(2)(B)(i).[4]

The court of appeals also correctly concluded that it could not review the BIA's streamlining decision under the APA. The APA restricts judicial review to "final agency action." 5 U.S.C. 704. "[T]he procedural decision that [petitioner] is appealing"—that is, the decision not to refer petitioner's appeal to a three-member panel—"was not the final agency action." Pet. App. 13a. The APA further provides that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review *on the review of* the final agency action." 5 U.S.C. 704 (emphasis added). In this case, however, the INA expressly deprived the court of appeals of jurisdiction to review the final agency action. See 8 U.S.C. 1252(a)(2)(B)(i) (stating that, "[n]otwithstanding any other provision of law (statutory or nonstatutory) * * * no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under [8 U.S.C.] 1229b"). Accordingly, the court of appeals correctly determined that it also lacked jurisdiction to review the "intermediate procedural decision[s]" (Pet. App. 12a) that preceded the final agency action.

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[4] As petitioner notes (Pet. 34), Section 1252(2)(D) provides that "[n]othing in subparagraph (B) * * * shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." 8 U.S.C. 1252(2)(D). As the court of appeals held (see Pet. App. 5a) and petitioner acknowledges (see Pet. 12-13, 30), however, the BIA's "discretionary determination of whether [petitioner] showed the requisite 'exceptional or extremely unusual hardship' for cancellation of removal under [8 U.S.C.] 1229b(b)(1)(D)" is not covered by that provision. Pet. App. 5a.

2. The court of appeals' unpublished decision in this case does not conflict with any of the decisions identified by petitioner.

a. Petitioner asserts that the court of appeals' decision conflicts with *Quinteros-Mendoza* v. *Holder*, 556 F.3d 159 (4th Cir. 2009), and *Purveegiin* v. *Gonzales*, 448 F.3d 684 (3d Cir. 2006). See Pet. 17-18. In both of those cases, however, the court of appeals had jurisdiction to entertain a petition for judicial review of the final order of removal. See *Quinteros-Mendoza*, 556 F.3d at 164-165 (addressing "the merits of the BIA's final order in this case" and denying the petition for review because "the record lends adequate support for the findings of the IJ and the BIA"); *Purveegiin*, 448 F.3d at 684-685; see also *Purveegiin* v. *Attorney Gen. of the United States*, No. 07-1227, 2009 WL 2599800, at *3 (3d Cir. Aug. 25, 2009) (per curiam) (concluding, after a remand, that the court "ha[d] jurisdiction over Purveegiin's petition for review" and denying it on the merits). In contrast, the court of appeals' decision in this case was expressly based on the fact that the court *lacked* jurisdiction to consider a petition for review of the final order of removal. See Pet. App. 12a-13a. In addition, the court of appeals specifically stated that it was not holding "that we never have jurisdiction to review a BIA member's decision not to forward a case to a three-judge panel." *Id.* at 13a. Accordingly, any conflict about whether a court of appeals has jurisdiction to review the BIA's streamlining decisions in a situation where the court *also* has jurisdiction to entertain a petition for review of the final order of removal simply is not implicated in this case.[5]

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[5] Petitioner also asserts that EOIR has "acknowledged the division among the circuits regarding appellate jurisdiction to review stream-

b. Petitioner also asserts (Pet. 22-26) that the courts of appeals are divided on whether they have jurisdiction to review a single BIA member's decision to affirm without opinion (AWO) an IJ's decision pursuant to 8 C.F.R. 1003.1(e)(4). Any such split is not directly implicated here, because the BIA issued its own decision in this case. The question here is thus whether a court of appeals has jurisdiction to review the BIA's decision about what *kind* of decision to issue.

At any rate, even in the AWO context, petitioner does not identify any decision in which a court of appeals held that it *had* jurisdiction to review the BIA's decision to use the AWO procedure in a case in which the court *lacked* jurisdiction to consider a petition for review of the final order of removal. In *Haoud* v. *Ashcroft*, 350 F.3d 201, 205 (2003), the First Circuit concluded that it would have jurisdiction to consider "the merits of Haoud's asylum claim," depending on the basis for the

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lining orders." Pet. 21-22 (citing 73 Fed. Reg. 34,657 (2008)). The "inconsistency" in lower-court decisions identified in that proposed regulation did not involve the question at issue here, which is whether a court of appeals has jurisdiction to review the BIA's decision to resolve an appeal via a single-member decision notwithstanding the court's lack of jurisdiction to review the final order of removal. Rather, the proposed regulation stated that the courts of appeal had reached different conclusions about whether, "*in addition to* reviewing the merits of the underlying immigration judge's decision, the court may *also* review the Board's decision to issue an [affirmance without opinion], as opposed to some other order." 73 Fed. Reg. at 34,657 (emphasis added). The decisions cited in the proposed regulation with respect to that question are the same ones cited in the petition for a writ of certiorari. Compare Pet. 24-25, with 73 Fed. Reg. at 34,657. As explained below, see pp. 12-13 & note 6, *infra*, none of those decisions involved a situation in which the court of appeals lacked jurisdiction to consider a petition for review from the final order of removal.

BIA's decision, and it remanded so that the BIA could clarify the basis for its decision. In *Smirko* v. *Ashcroft*, 387 F.3d 279 (2004), the Third Circuit specifically stated that it "ha[d] jurisdiction to review [the] final order of removal," *id.* at 282, and it conducted a lengthy examination of the merits of the underlying decision, *id.* at 282-292. Similarly, in *Blanco de Belbruno* v. *Ashcroft*, 362 F.3d 272 (2004), the Fourth Circuit considered and rejected the alien's "substantive contention that the [IJ] erred in failing to find that she * * * established past persecution or a well-founded fear of future persecution if she returned to Guatemala." *Id.* at 283-284. Finally, in *Chen* v. *Ashcroft*, 378 F.3d 1081 (2004), the Ninth Circuit specifically stated that a court *must* have jurisdiction to consider a petition for review from the final order of removal in order for it *also* to have jurisdiction "to review the BIA's decision to streamline." *Id.* at 1087 (citing *Falcon Carriche* v. *Ashcroft*, 350 F.3d 845, 855 (9th Cir. 2003)).[6]

3. Petitioner also makes various general attacks on the BIA's streamlining procedures. See Pet. 27-32, 36-37. Petitioner does not contend, however, that those procedures are facially invalid under the Constitution or the INA. Indeed, every court of appeals to address the question has upheld the BIA's streamlining procedures against facial statutory and constitutional challenges. See *Albathani* v. *INS*, 318 F.3d 365 (1st Cir. 2003);

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[6] As petitioner recognizes (Pet. 25), the Sixth and Seventh Circuits have only assumed, without deciding the question, that they have jurisdiction to review the Board's decision to apply its AWO procedure. See *Denko* v. *INS*, 351 F.3d 717, 732 (6th Cir. 2003); *Georgis* v. *Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003). At any rate, *Denko* and *Georgis* both involved situations in which the court of appeals had jurisdiction to consider the merits of the underlying petition for review. See *Denko*, 351 F.3d at 722-725; *Georgis*, 328 F.3d at 967.

Zhang v. *United States Dep't of Justice*, 362 F.3d 155 (2d Cir. 2004); *Dia* v. *Ashcroft*, 353 F.3d 228 (3d Cir. 2003) (en banc); *Khattak* v. *Ashcroft*, 332 F.3d 250 (4th Cir. 2003); *Soadjede* v. *Ashcroft*, 324 F.3d 830 (5th Cir. 2003) (per curiam); *Denko* v. *INS*, 351 F.3d 717 (6th Cir. 2003); *Georgis* v. *Ashcroft*, 328 F.3d 962, 962 (7th Cir. 2003); *Loulou* v. *Ashcroft*, 354 F.3d 706 (8th Cir. 2003), cert. denied, 543 U.S. 487 (2004)); *Falcon Carriche*, 350 F.3d at 845; *Yuk* v. *Ashcroft*, 355 F.3d 1222 (10th Cir. 2004); *Mendoza* v. *United States Attorney Gen.*, 327 F.3d 1283 (11th Cir. 2003).

Those decisions are correct. Neither the Constitution nor the INA imposes a requirement that some or all administrative appeals in immigration cases be heard by multi-member panels. The INA provides only that an IJ shall inform an alien of "the right to appeal" the IJ's order of removal, 8 U.S.C. 1229a(c)(4), and that the IJ's "order of deportation" becomes final upon the earlier of "a determination by the Board of Immigration Appeals affirming such order" or the expiration of time in which to take an appeal, 8 U.S.C. 1101(a)(47). The government thus could, consistent with the INA, simply provide that *all* appeals from orders of removal are to be adjudicated by a single member of the BIA, as is the case in many other administrative schemes. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978) ("agencies should be free to fashion their own rules of procedure," so long as not proscribed by Congress) (quotation marks omitted); cf., *e.g.*, 7 C.F.R. 1.132, 1.145 (providing that decisions of administrative law judges are appealed to a single "judicial officer" acting for the Secretary of Agriculture). There could be no constitutional doubt about the propriety of such a regulation. See *Albathani*, 318 F.3d at 375 (observing that, even

when the Board streamlines a case, the alien still has a right to a full and fair asylum hearing before the IJ, the opportunity to present her arguments to the BIA, and a decision by a Board member); *Falcon Carriche*, 350 F.3d at 850 (noting that the argument that aliens are "entitled to an additional procedural safeguard—namely, review of their appeal before three members of the BIA"—has "no support in the law").

Rather than attacking the streamlining procedures directly, in the face of uniform appellate decisions upholding them, petitioner has attempted to fit her case within a debate among the circuits on whether the BIA's decision not to refer an appeal to a three-member panel is reviewable apart from the underlying merits of a final order of removal. As explained previously, however, any such conflict is not implicated here. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2009